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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054284
Party	Defendant Hydrade Beverage Company, Inc.
Correspondence Address	HYDRADE BEVERAGE COMPANY INC 110 W 7TH ST STE 1000 TULSA, OK 74103 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	08/09/2011
Attachments	HYDRADE--Motion to Dismiss.pdf (7 pages)(210362 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRIAN SCHAFLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Cancellation No. 92054284**
	)	
HYDRADE BEVERAGE COMPANY, INC.,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION TO DISMISS
AND BRIEF IN SUPPORT

Comes now the Respondent, Hydrade Beverage Company, Inc., and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves the Board to dismiss the Petition for Cancellation (the "Petition") filed by Petitioner, Brian Schafler, on the ground that the Petition fails to state a claim against Respondent upon which relief can be granted.

Petitioner seeks to cancel Respondent's Registration No. 2,402,539 for the mark, **HYDRADE** (the "Mark"). However, the Petition fails to allege any facts as would, if proved, establish that Petitioner is entitled to the relief sought. In the absence of any allegations establishing that Petitioner has a "real interest" in this proceeding, Petitioner lacks standing to proceed. Consequently, the action must be dismissed.

Additionally, the Petition is devoid of any allegation establishing that a valid basis exists for cancellation of Respondent's Registration. Petitioner contends that Registration No. 2,402,539 has been abandoned. However, Petitioner does not allege that Respondent, the owner of the Mark, has discontinued use of the Mark. For these reasons, as discussed more fully in the following Brief in Support, the Petition fails to state a claim which is plausible on its face and should be dismissed in its entirety.

BRIEF IN SUPPORT

BACKGROUND

Sports Acquisition Corporation ("SAC") registered the mark, **HYDRADE**, Registration No. 2,402,539, for sports drinks in International Class 032.[1] As the Office records clearly reflect, SAC assigned its entire interest in the Mark to Respondent.[2] Respondent is thus, the owner of the Mark. See T.B.M.P. § 309.02(a).

On November 11, 2009, Respondent filed its Combined Declaration of Use and Application for Renewal of Registration of a Mark Under Sections 8 and 9. That Declaration was accepted, and renewal of Registration No. 2,402,539 granted, on November 20, 2009.

On July 22, 2011, Petitioner filed his Petition seeking to cancel Registration No. 2,402,539. See Petition, on file herein. Cancellation is sought on the sole ground that the Mark has been abandoned. Id. at 1. Petitioner apparently believes the Mark is owned by Respondent's predecessor-in-interest, SAC, and that because SAC is allegedly out of business, the Registration has been abandoned. Id. at 2.

The Petition fails to state a claim plausible on its face for which relief may be granted. The Petition is devoid of any allegation: (1) establishing Petitioner's standing to maintain a cancellation proceeding; or (2) demonstrating that there exists a valid basis for cancelling Respondent's Registration. Thus, the Petition for Cancellation must be dismissed.

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[1] "The file of an application or registration that is the subject of a Board inter partes proceeding forms a part of the record of the proceeding without any action by the parties, and reference may be made to the file by any party for any relevant and competent purpose." T.B.M.P. § 704.03(a); 37 C.F.R. § 2.122(b)(1). Thus, Respondent's reliance upon objective facts, not subject to proof, which are contained in the registration file does not convert this Motion into one for summary judgment. See Compagnie Gervais Danone v. Precision Formulations, LLC, 89 U.S.P.Q. 2d 1251, 1256 (T.T.A.B. 2009).

[2] Petitioners are expressly directed to review the assignment records and determine the current trademark owner prior to filing a Petition for Cancellation. See T.B.M.P. § 309.02(a). Had he done so here, Petitioner would have known that Respondent, not SAC, owns the Mark.

ARGUMENT AND AUTHORITY

I. STANDARD FOR MOTIONS TO DISMISS

Pursuant to Rule 8(a)(2) and 37 C.F.R. § 2.112(a), a petition for cancellation must contain "a short and plain statement showing why the petitioner believes he...is or will be damaged by the registration, state the grounds for cancellation, and indicate, to the best of petitioner's knowledge, the name and address of the current owner of the registration." In reviewing a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Board must examine the Petition in its entirety to determine whether it contains any allegations which, if proved, would entitle Petitioner to the relief sought. Ideas One, Inc. v. Nationwide Better Health, 89 U.S.P.Q. 2d 1952, 1953 (T.T.A.B. 2009).

"A plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted); see Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("[T]he pleading standard Rule 8 announces...demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557).

Instead, to withstand a motion to dismiss, the Petition must contain enough allegations of fact "to state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949-50 (quoting Twombly, 550 U.S. at 570); T.B.M.P. § 309.03(a)(2). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 129 S. Ct. at 1949. Accordingly, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and

plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557); see Totes-Isotoner Corp. v. United States, 594 F.3d 1346 (Fed. Cir. 2010) (holding a plaintiff need only allege "enough factual matter...to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level."). Dismissal is therefore appropriate where, as here, the Petition fails to allege "'facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed.'" Lane v. Simon, 495 F.3d 1182, 1186 (10th Cir. 2007) (quoting Forest Guardians v. Forsgren, 478 F.3d 1149, 1160 (10th Cir. 2007)).

II. THE PETITION TO CANCEL FAILS TO STATE A CLAIM AGAINST RESPONDENT UPON WHICH RELIEF CAN BE GRANTED

It is Petitioner's burden to plead "[f]actual allegations [sufficient] to raise a right of relief above the speculative level." Twombly, 550 U.S. at 555. Thus, Petitioner need allege sufficient factual matter as would, if proved, establish that: (1) the Petitioner has standing to maintain the proceeding; and (2) a valid ground exists for cancelling the mark. Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024, 1031, 213 U.S.P.Q. 185 (C.C.P.A. 1982). Petitioner has not, and cannot, make the requisite showing. Accordingly, Petitioner's "claim" against Respondent is inherently speculative and does not survive a motion to dismiss.

A. The Petition Fails to Allege Any Facts Regarding Petitioner's Standing to Maintain This Proceeding

With respect to standing, Petitioner must allege facts which, if later proven, would establish that Petitioner has a "real interest" in the proceeding, and a "reasonable basis" for a belief that he would suffer some kind of damage if the Registration is not cancelled. Ritchie v. Simpson, 170 F.3d 1092, 1095, 50 U.S.P.Q. 2d 1023 (Fed. Cir. 1999); Lipton, 670 F.2d at 1028. To plead a "real interest," Petitioner must allege a "direct and personal stake" in the outcome of the proceeding. Ritchie, 170 F.3d at 1095; Lipton, 670 F.2d at 1028. The allegations in support of Petitioner's belief of damage "must have a reasonable basis in fact." Ritchie, 170 F.3d at

1098 (citing Universal Oil Prods. v. Rexall Drug & Chem. Co., 463 F.2d 1122, 174 U.S.P.Q. 458, 459-60 (C.C.P.A. 1972)).

The Petition at issue is silent regarding Petitioner's standing. The only allegations pertaining to Petitioner concern his name and contact information. See Petition, on file herein. The Petition is devoid of any allegations establishing Petitioner's interest, if any, in the proceeding, or Petitioner's belief, if any, that he will suffer damage if Registration No. 2,402,539 is not cancelled. Id. In the absence of allegations establishing Petitioner's interest, if any, in this action he is a mere intermeddler and lacks standing to maintain this action.

B. The Petition Fails to Allege Facts Establishing That a Valid Ground Exists for Cancellation of Respondent's Registration

The sole ground upon which Petitioner seeks cancellation of Respondent's Registration is "abandonment." See Petition at 1, on file herein. This claim is based upon Petitioner's apparent belief that SAC owns Registration No. 2,402,539. Id. at 2. Petitioner is mistaken.

Under the Lanham Act, a trademark is deemed abandoned for nonuse "when its use has been discontinued with the intent not to resume such use." 15 U.S.C. § 1127. "Nonuse for three consecutive years shall be prima facie evidence of abandonment." Id. Thus, "[t]o show abandonment by nonuse, the party claiming abandonment must prove both the trademark owner's (1) 'discontinuance of trademark use' and (2) 'intent not to resume such use.'" Grocery Outlet, Inc. v. Albertson's, Inc., 497 F.3d 949, 951, 83 U.S.P.Q. 2d 1949 (9th Cir. 2007) (citation omitted); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 147, 82 U.S.P.Q. 2d 1414 (2nd Cir. 2007).

Petitioner's abandonment claim is fatally flawed. In support of his claim, Petitioner alleges only that "This mark that is owned by Sports Acquisition Corporation CORPORATION TEXAS 5050 Quorum Drive, Suite 441 Dallas, TEXAS 75240. Is OUT of Business." See Petition at 2, on file herein. However, as reflected in the ESTTA form "cover sheet," and the

assignment information of record, Respondent, not SAC, owns the Mark.[3] See T.B.M.P. § 309.02(a). There is no allegation that Respondent has ever discontinued use of the Mark. Moreover, even were the Board to presume use of the Mark has been discontinued, the period of nonuse has existed for less than three years as evidenced by the Combined Declaration of Use Respondent filed, and the Office accepted, in November, 2009. Finally, there is no suggestion that Respondent, if it had discontinued use, intends not to resume use of the Mark.

Simply put, the Petition lacks any allegation sufficient to support a claim of abandonment by Respondent, the trademark owner, which might serve as a valid basis for cancellation of Registration No. 2,402,539. Accordingly, the Petition fails to state a claim against Respondent which is plausible on its face and must be dismissed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this cancellation proceeding be dismissed in its entirety for failure to state a claim upon which relief may be granted.

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[3] In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, Petitioner's well-pleaded allegations must be accepted as true. See Advanced Cardiovascular Systems, Inc. v. SciMed Life Systems, Inc., 988 F.2d 1157, 26 U.S.P.Q. 2d 1038 (Fed. Cir. 1993). However, "[t]he Board will not take as true any allegations contradicting facts in Office records." Compagnie, 89 U.S.P.Q. 2d at 1256.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT, HYDRADE BEVERAGE COMPANY, INC.

CERTIFICATE OF FILING

I, Anthony J. Jorgenson, hereby certify that a copy of the foregoing **RESPONDENT'S MOTION TO DISMISS AND BRIEF IN SUPPORT** is being filed with the Electronic System for Trademark Trial and Appeals ("ETTSA") of the U.S. Patent and Trademark Office on this 9th day of August, 2011.

Anthony J. Jorgenson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 9th day of August, 2011, a true and correct copy of the above and foregoing **RESPONDENT'S MOTION TO DISMISS AND BRIEF IN SUPPORT** was served by first class mail, proper postage prepaid, upon Applicant at the following address:

Brian Schafler
5387 S.W. 120th Ave.
Cooper City, FL 33330

Anthony J. Jorgenson

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